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NSLP 2006-42

TO: School Food Authorities

FROM: Pat Cook, Consultant
Office of Child Nutrition and School Health

SUBJECT: School Districts and Federal Procurement Regulations

In October of 2001, the United States Department of Agriculture (USDA) advised the Nevada Department of Education that USDA's regulations (7 CFR Part 3016.36(b)) prohibit the awarding of contracts to any entity that develops or drafts specifications, requirements, statements of work, invitations for bids, requests for proposals, contract terms and conditions or other procurement documents. USDA initiated this guidance after learning that a number of school food authorities (SFA) were not drafting their own specifications and procurement documents for certain software acquisitions but instead directly incorporating a list of features written by a prospective bidder. USDA continues to receive complaints of SFA using a prospective bidder to draft specifications and procurement documents and feel that this potential continued noncompliance with USDA regulations warrants our addressing the issue.

USDA is asking that State agencies carefully monitor SFA compliance with these regulations and take appropriate actions. In failing to fulfill its responsibilities to draft its own specifications and procurement documents, an SFA which copies a list of features or evaluation and ranking criteria drafted by a potential vendor and then permits that potential vendor to submit a bid has violated USDA regulation 7 CFR Part 3016.60(b). While schools have broad discretion in gathering information for use in connection with procurements, information from potential bidders must be appropriately modified to develop tailored specifications; otherwise these bidders must be excluded from competing for such procurements. This is to ensure objective contractor performance and eliminate unfair competitive advantage. A person that develops or drafts specifications, requirements, statements of work, invitations for bid, requests for proposals, contract terms and conditions or documents specifically for use by an SFA in conducting procurement under the CND programs shall be excluded from competing for such procurements.

Any action which diminishes open and free competition seriously undermines the integrity of the procurement process and may subject the SFA to bid protests. Therefore, SFA must have protest procedures in place and disclose information regarding a protest to the State agency. We are concerned that SFA may not be properly responding to protests and concerns raised by potential contractors. Pursuant to §3016.36(b) (12), SFA must have protest procedures in place to handle and resolve disputes relating to their procurements and must in all instances disclose information regarding a protest to their State agency.